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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

DANIEL PHILBIN, Plaintiff and Respondent, v. CARNEROS RESORT AND SPA et al., Defendants and Appellants.	A154317 (Napa County Super. Ct. No. 17CV001463)

Carneros Resort and Spa (Carneros); Flynn Properties, Inc.; GEM Realty Capital, Inc.; GF Carneros Holdings, LLC; and Evolution Hospitality (collectively appellants) appeal from denial of their motion to compel arbitration of Daniel Philbin's claim of wrongful termination and retaliation in violation of Labor Code section 1102.5. The motion was denied on the grounds appellants failed to provide "admissible evidence of an arbitration agreement" and the "uncertainty" of the agreement as to which entity or entities are bound by the agreement.

We shall affirm denial of the motion to compel.

BACKGROUND

Daniel Philbin worked at Carneros, a luxury hotel and resort in Napa County, for 14 years as director of facilities. Philbin has a degree in landscape architecture from the California Polytechnic State University in San Luis Obispo and is a licensed wastewater treatment plant operator, water treatment operator, and water distributor operator.

The complaint states that, during the period he worked for Carneros, the company experienced several ownership and name changes. Until 2013, the resort operated as the

"Carneros Inn." That year, two Illinois-based companies, GF Carneros Holdings, LLC and GEM Realty Capital, bought the property together with Flynn Properties, Inc., a commercial real estate corporation based in San Francisco. After this purchase, the property was renovated and renamed the Carneros Resort and Spa. The new ownership entity was led by Greg Flynn, the owner and CEO of Flynn Properties.[1] In late 2016, Carneros's daily operations were taken over by Evolution Hospitality (Evolution), a property management company based in San Clemente, California.[2]

Beginning in 2014, Philbin assertedly became increasingly concerned about the scope and nature of a number of the company's planned and pending projects, and raised these concerns with his supervisors and Flynn. Philbin's primary concerns related to excessive water consumption by Carneros; deceptive water usage reports to a Napa County water agency; noncompliance with the Americans with Disabilities Act during renovations to guest cottages, sites, and pool areas; construction and grading without proper permits or authorization; and submitting misleading scopes of work to the county; and concealing from the county Carneros's intensified consumption of water.

For example, in 2015, Flynn directed Carneros to drill a well to create a new water source despite Philbin's protests that drilling in that area was prohibited by use permit restrictions. Flynn told Philbin that he "owned the land and it was fine." The complaint relates numerous other examples of Flynn's increasing annoyance at Philbin's concerns about Carneros's violations of statutes and regulations, particularly those pertaining to water use. In 2016, upon learning that Carneros was under-reporting the extent of its water use to the county, Philbin angered Flynn by reporting the error. According to the

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[1] Appellants' answer to the complaint was not filed until after denial of the motion to compel. The answer contains a general denial of "each and every allegation contained in the unverified complaint," but it does not specifically deny any of those allegations; nor during the proceedings below did appellants dispute any of Philbin's testimony regarding the personal relationship between him and Greg Flynn.

[2] GF Carneros Holdings, LLC, GEM Realty Capital, Flynn Properties, Inc., and Evolution Hospitality were all designated by the complaint as named codefendants with Carneros.

complaint, "[t]his was not the only time Mr. Flynn threatened Mr. Philbin for insisting on scrupulously reporting the resort's correct water usage instead of minimizing it, or conveying erroneous readings, or knowingly utilizing faulty water meters on the property."

In March 2017, Philbin met with Greg Flynn in the latter's San Francisco office. According to the complaint, "[t]he meeting was tense. Plaintiff began the meeting by telling [Flynn] that he hoped his proposal to focus on CRS's water issues was not taken as 'an F-U.' Unfortunately, [Philbin] learned that is exactly how Flynn took it and further, that Flynn wanted retribution. During the hour-long meeting, Flynn said that if plaintiff swallowed his pride, he could have his old job back. Philbin immediately understood that Flynn had strung him along on his proposal and although he was ostensibly offering Philbin the opportunity to stay at CRS, the offer was illusory." At the end of the meeting, Flynn told Philbin that " '[o]ne thing that has always pissed me off was that you installed those (accurate) water meters without my approval or even asking me. That move has caused me so much headache over the years.' "

A week later, Philbin accepted Flynn's offer to continue to work as director of Facilities until the end of 2017. However, shortly after notifying the managing director of this decision Philbin learned that, without notifying him, the managers of Carneros had met with members of the facilities department and told them he had been terminated. A few months later, Philbin received unexpected medical bills from Kaiser and was told that Carneros had retroactively terminated his health coverage.

The Motion to Compel Arbitration

On December 27, 2017, Philbin filed his complaint alleging causes of action for retaliation (Lab. Code, § 1102.5) and wrongful termination in violation of public policy.

On February 15, 2018, appellants filed their motion to compel arbitration. The first paragraph of the memorandum of points and authorities in support of the motion states that "[a]s a condition of his employment with Evolution Hospitality ('Evolution'), Daniel Philbin signed a stand-alone agreement [i.e., one not part of an employment agreement] in which he voluntarily agreed that he would submit any claims relating to his

employment to arbitration. Plaintiff cannot deny that he entered into this valid contractual relationship with Evolution. Plaintiff also cannot deny that this agreement encompasses and applies to all the claims he now asserts in this litigation. . . . The arbitration agreement meets all legal requirements to be enforceable. Accordingly, Evolution urges the court to compel plaintiff's compliance to the agreement, submit this matter to arbitration, and stay plaintiff's PAGA [Private Attorneys General Act] claims pending resolution of the arbitration."

The Arbitration Agreement

The operative provision of the arbitration agreement—which Philbin executed about six months before he was terminated—is as follows:

"The company and I also agree to use binding arbitration as the sole and exclusive way to resolve all disputes between us, including claims involving my pay or the termination of my employment. . . . Any claims that I may have against the Company (or its owners, directors, officers, managers, employees, or agents), or that the Company may have against me, will be submitted to and determined exclusively . . . under a law called the Federal Arbitration Act [FAA], subject to California Procedures . . . ."

The only mention in the arbitration agreement of an entity that might be "the company" referred to in the agreement appears in the following sentence which appears in the final paragraph of the agreement: "Lastly, I understand that things can change, so, except for the Terms of Employment and the arbitration agreement, Evolution Hospitality has the right to make changes to the policies and practices outlined here."

To authenticate the arbitration agreement, appellants offered the February 14, 2018 declaration of Mary Catherine Sexton, vice president for Human Resources for Evolution from October 3, 2016, to March 31, 2017. Although the declaration stated that the agreement it purported to authenticate was attached, in fact it was not. As we later explain, the arbitration agreement was (perhaps inadvertently) attached instead to the memorandum of points and authorities in support of the motion to compel. Noting that "Evolution currently provides hotel management services to hotels across seven different states, including Carneros Resort and Spa," the declaration states that "[w]hile

Evolution's arbitration agreement is silent as to who pays for the arbitrator's costs, I understand that Evolution will pay for all costs unique to the arbitration forum." The declaration does not, however, disclose the basis upon which Sexton "understands" that Evolution will pay the costs of arbitration.

The next day, Sexton executed another declaration in support of the motion stating that she is "familiar with the ownership entities related to the Carneros Resort and Spa, as well as the relationship of the management entities at that property," and that "Evolution Hospitality is the employer and management company that provides management for all employees on-site and is charged with the day-to-day management of hotel operations. The ownership entity for the Carneros Resort and Spa is GF Carneros Holdings, LLC. GEM Realty, through its management fund, is a member of GF Carneros Holdings, LLC." The declaration goes on to state that "Carneros Resort and Spa is a DBA (business name), not a business entity in and of itself" and that "[w]hile Flynn Properties, Inc. has no ownership in the Carneros Resort and Spa, I understand that under Evolution's arbitration agreement, it falls under the definition of 'company' as defined in the agreement." As in the first declaration in which she states her "understanding" that Evolution "falls under the definition of 'company' as defined in the agreement," Sexton does not in her second declaration describe the basis upon which she "understands" the nature of the relationships between Evolution and the other appellants she refers to.

In the declaration he submitted in opposition to appellants' motion, Philbin states that he did not sign the arbitration agreement willingly, but only because he was told he would lose his job if he did not. He also states that at the time he was "forced" to sign the agreement no one defined for him what entity or entities were meant by the generic term "company," was not provided any arbitration rules or procedures, and not directed to any place where he could obtain such information.

Philbin also attached to the declaration and authenticated copies of Flynn Properties' websites representing that it possessed an ownership interest in Carneros with others, contradicting Sexton's testimony. As indicated, the main thrust of Philbin's declaration is that his performance was not supervised by Evolution nor was he hired or

terminated by Evolution. Instead, he was hired, supervised, and terminated by Greg Flynn, the CEO of Flynn Properties, Inc., who apparently supervised the management of the resort on behalf of Flynn Properties and the three other entities that jointly purchased Carneros Resort and Spa (formerly the Carneros Inn) in 2013.

Philbin opposed the motion to compel arbitration primarily on the ground appellants had not proved the existence of an enforceable contract because the agreement does not itself identify any specific employer entity bound by it and such an entity is not otherwise identifiable. Philbin also maintained that the arbitration agreement was so "permeated" with procedural and substantive unconscionability that it could not be salvaged by severing one or two provisions.

On April 17, 2018, after Philbin filed his opposition, appellants belatedly submitted the short declaration of Kris Munoz, Evolution's regional director for human resources. The declaration states that "Philbin came on board as of October 3. As part of our standard practice, we gave Philbin a written offer letter, an employee handbook, the arbitration agreement, and various other documents related to Evolution's policy." Munoz stated that "[a] true and correct copy of the October 2016 offer letter given to Philbin is attached as Exhibit 1 and incorporated by this reference."[3] Munoz does not say exactly when the documents he refers to were provided to Philbin or by whom and, like Sexton's declarations, he does not state that the documents were provided to Philbin prior to or contemporaneously with his signing of the arbitration agreement.

At the close of the April 24, 2018 hearing, after the court stated its decision to adopt the tentative ruling denying the motion and directed counsel for Philbin to prepare an order, counsel for appellants stated: Your Honor, may we request a statement of decision?" The court responded: "I don't think it's appropriate for a law and motion matter," and Carneros's counsel answered: "Fair enough, Your Honor, Thank you."

[3] The offer letter used both "Evolution Hospitality" and "Company" when describing the terms of Philbin's offer of employment.

The Trial Court Ruling

The final ruling, dated May 4, 2018, which was virtually identical to the tentative ruling, denied the motion to compel on two grounds.

First, because the arbitration agreement was not properly attached to the motion to compel but to the memorandum of points and authorities in support of the motion, the defendants "failed to offer admissible evidence of an arbitration agreement in support of their motion" and, second, the agreement is uncertain. The first reason could have been rectified, but the second could not.

As the court stated, "[t]he agreement states [that] it is made between 'The company' and plaintiff. The term 'company' is not defined in the agreement. Further, the agreement is not executed by anyone on behalf of 'the company,' which might indicate what entity 'the company' is and what entity plaintiff contracted with. This quandary is fatal to the existence of a valid agreement."

DISCUSSION

The Claims Advanced by Appellants in this Court

A.

Appellants contend that the trial court erred in three ways: (1) in refusing to issue a statement of decision, (2) in denying the motion to compel on the ground appellants failed to properly authenticate the arbitration agreement, and (3) in failing to consider the arbitration agreement and the letter from Evolution Hospitality offering Philbin employment "as parts of substantially one transaction." (Civ. Code, § 1642.)

The first two claims can be dealt with summarily as, even indulging the assumption they are meritorious, the alleged errors are both harmless.

"[W]here there is an adjudication of a question of fact by the court in deciding a petition to compel arbitration, a request for a statement of decision in the *manner* required by [Code of Civil Procedure] section 632 obligates the court to issue one." (*Metis Development, LLC v. Bohacek* (2011) 200 Cal.App.4th 679, 689 (*Metis*).) At least arguably, this edict may not be applicable where the adjudication relates to a question of law, not one of fact, such as the determination that a contract is unenforceable. It is

unnecessary for us to address this question, however, because "a trial court's failure "to issue a statement of decision is not reversible per se, but is subject to harmless error review" (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108), and the failure to do so here was harmless.

Citing *Metis, supra*, 200 Cal.App.4th at page 690, appellants claim they are prejudiced by the court's failure to issue a statement of decision because "there is abundant 'evidence that could have led to a ruling in appellants' favor.' " However, the absence of a statement of decision did not truly compromise appellants' ability to use any relevant evidence. As pointed out in *Metis,* "[t]o comply with a request for a statement of decision, a court need only fairly disclose its determinations as to the ultimate facts and material issues in the case." (*Id.* at p. 689.) The tentative ruling adopted by the court as the final ruling fairly disclosed the material facts and legal issues in this case, which are uncomplicated. In effect, the written ruling "explain[ed] the factual and legal basis for its decision as to . . . the principal controverted issue[]," as required by section 632 of the Code of Civil Procedure. (*Metis*, at p. 687, fn. 4.)

The trial court's conclusion that, because appellants had not properly authenticated the arbitration agreement, they had "not offered admissible evidence of an arbitration agreement in support of its motion," is also harmless even if erroneous. First of all, Philbin never challenged the authenticity of the arbitration agreement. Moreover, as we have explained, appellants have not identified any evidence that might be of use to them that it was unable to employ because the arbitration agreement had not been properly authenticated. Additionally, the seemingly inadvertent attachment of the arbitration agreement to the brief in support of the motion rather than the motion itself was rectified. The first declaration of Sexton authenticated the arbitration agreement, which was attached to that declaration. In any case, the alternative basis upon which the court denied the motion to compel, and other features of the record, establish that, like Philbin, the court did not genuinely question the authenticity of the arbitration agreement.

Thus, we turn to the genuine issue presented by this appeal: whether the failure of the agreement to specify the employer bound by the agreement renders it invalid.

B.

As we recently stated in *Ramos v. Westlake Services, LLC* (2015) 242 Cal.App.4th 674 (*Ramos*), "when presented with a motion to compel arbitration, the court's first task is to determine whether the parties have entered into an agreement to arbitrate their claims. [Citation.] Courts 'apply general California contract law to determine whether the parties formed a valid agreement to arbitrate their dispute.' [Citation.] 'General contract law principles include that "[t]he basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of the contract[]." ' [Citation.] 'Contract law also requires the parties to agree to the same thing in the same sense.' [Citation.] 'The petitioner [seeking arbitration] bears the burden of proving the existence of a valid arbitration agreement by a preponderance of the evidence, while a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation.] The trial court sits as the trier of fact, weighing all the affidavits, declarations, and other documentary evidence, and any oral testimony the court may receive at its discretion, to reach a final determination. [Citation.]' [Citation.]

' "There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]" ' 'When ruling on a petition to compel arbitration, the superior court may consider evidence on factual issues such as contract formation bearing on the threshold issue of arbitrability. . . . On appeal we must review the court's factual ruling on arbitrability under the substantial evidence test.' [Citation.] ' "[W]e review the trial court's order, not its reasoning, and affirm an order if it is correct on any theory apparent from the record." ' [Citation.]" (*Ramos, supra,* 242 Cal.App.4th at pp. 685–686.)[4]

[4] Appellants advance a very different standard of review predicated on the proposition that the issue in this case is not one of fact but one of law. Appellants rely on the principles that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the

In effect, the trial court court's conclusion— that the parties did not form a valid agreement to arbitrate their dispute— resulted from appellants failure to sustain their burden to show, by a preponderance of the evidence, that the parties agreed to the same thing in the same sense. (*Ramos, supra,* 242 Cal.App.4th at p. 685, citing *Avery v. Integrated Healthcare Holdings, Inc*. (2013) 218 Cal.App.4th 50, 59.)

In reaching this legal conclusion, the trial court was guided by *Flores v. Nature's Best Distribution, LLC* (2016) 7 Cal.App.5th 1 (*Flores*). In that case the Court of Appeal held that the defendants failed to prove that the plaintiff agreed to submit her employment discrimination claims to binding arbitration and affirmed an order denying a motion to compel arbitration. Among other reasons, the court explained, the agreement stated that it was between the employee and the company" but the body of the agreement defined neither term. The signature block of the agreement had the name "Julie Flores" printed and signed under the word "employee," but the signature block for the employer was not filled, dated, or signed under the heading " 'Authorized Employer Signature.' " Therefore, the court stated, "the Agreement does not identify with which entity or entities plaintiff had agreed to submit 'all legal, equitable and administrative disputes' to the AAA for mediation and binding arbitration." (*Id*. at p. 9.) The failure of the arbitration agreement—which was not part of an employment agreement and stood alone—to

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contract language itself or an allegation of waiver, delay, or a like defense to arbitrability" (*Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.* (1983) 460 U.S. 1, 24–25) and that " '[a] heavy presumption weighs the scales in favor of arbitrability; an order directing arbitration should be granted "unless it may be said with positive assurance that the arbitration [provision] is not susceptible of an interpretation that covers the asserted dispute." ' " (*Gravillis v. Coldwell Banker Residential Brokerage Co*. (2006) 143 Cal.App.4th 761, 771.) On the basis of these propositions—which do not pertain to the standard of appellate review—appellants argue that "[w]here as here 'conflicting extrinsic evidence was not offered below,' this court 'appl[ies] a de novo, or independent, standard of review on appeal from [the] trial court's determination of whether an arbitration agreement applies to a particular controversy.' [Citation.]" Claiming there is no conflict in the extrinsic evidence in the present case as to whether the arbitration agreement and the offer letter are parts of "substantially one transaction under [Civil Code] section 1642," appellants assert the question before us "is a pure question of law subject to de novo review."

identify the party authorized to enforce the agreement was among the reasons the Court of Appeal found the agreement invalid. (*Ibid*.)

Appellants maintain *Flores* was wrongly decided[5] or, if not, that it is inapposite. Appellants' effort to distinguish *Flores* is based on section 1642 of the Civil Code (section 1642), which provides that "[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." According to appellants, the arbitration agreement and the offer must be "taken together," and if they are, "company" in the arbitration agreement must be deemed to mean Evolution Hospitality, because that is the entity identified as the employer in the offer letter. *Flores* is inapposite, appellants say, because the arbitration agreement in that case was a "stand-alone" agreement and there were therefore "no possible aids to assist in interpretation," whereas in this case the offer letter from Evolution assertedly made clear that it was the "company" referred to in the arbitration agreement. This is not a very persuasive argument.

As has been said, " ' " '[f]or the terms of another document to be incorporated into the document executed by the parties *the reference must be clear and unequivocal* . . . .' " ' " (*R.W.L. Enterprises v. Oldcastle, Inc.* (2017) 17 Cal.App.5th 1019, 1027–1028.) That does not appear to be the case here. Neither document "clearly and unequivocally" refers to the other, nor do either appear to require incorporation of the terms of the other.

The only reference to Evolution in the arbitration agreement, which is at the end of the document, does not eliminate but arguably adds to the uncertainty. "Lastly," the final provision states, "I understand that things can change, so, *except for my Terms of*

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[5] Appellants described the reasons *Flores* was "wrongly decided" in two sentences: "Courts are required to interpret arbitration agreements as they do any other contract. (*Craig v. Brown & Root* (2000) 84 Cal.App.4th 416, 420.) To the extent *Flores* may be read as holding otherwise, it is wrongly decided." We do not think *Flores* can reasonably be read as questioning the proposition for which Carneros cites judicial authority; namely, that "[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate." (*Craig*, at p. 420.)

Employment and *the arbitration agreement,* Evolution Hospitality has the right to make changes to the policies and practices outlined here." (Italics added.) This statement indicates that the terms of the arbitration agreement can be changed, albeit not by Evolution, but fails to unambiguously indicate the company or other entity possessing the right to make changes. Nothing in the offer letter (or anything else in the record) indicates why, if Evolution *were* Philbin's employer, it would relinquish the right to make changes in the terms of his employment or the provisions of the arbitration agreement; nor does the offer letter shed much light on the identity of the "company" referred to in the agreement.

The offer letter does state that "you will be required to review, complete and/or execute other employment documents, including a binding arbitration agreement," but the provision of the arbitration agreement just discussed renders it difficult, if not impossible, to think the two documents "clearly and unequivocally" require incorporation of the terms of the other.

Furthermore, as appellants concede,[6] there is no evidence the offer letter and the arbitration agreement were executed contemporaneously. Neither Sexton nor Munoz specify the date Philbin signed the arbitration agreement and, as appellants concede, that date cannot be ascertained from the agreement itself. In short, as Philbin states in respondent's brief, the record contains no evidence of when the arbitration agreement was provided to Philbin, how it was provided, or who he received it from.

Finally, at the time appellants filed their motion to compel they had not answered Philbin's complaint or otherwise contested any of the allegations of the complaint or the statements in his declaration regarding Greg Flynn; specifically Philbin's assertion that in 2017, after he had received and signed the offer letter, he was terminated by Flynn, who was not an officer or agent of Evolution, but acting on behalf of himself, Flynn Properties, and the other entities that purchased Carneros in 2013. Philbin's declaration

[6] Appellants' opening brief states that Philbin "signed the offer letter on October 6" but signed the arbitration agreement on another day that month "(although the day of the month is not clear)."

strongly suggests that Flynn, not Evolution, controlled the terms of his employment. This evidence may not be dispositive, but it supports the trial judge's conclusion that the identity of Philbin's employer is so uncertain that the agreement must be deemed invalid.

The foregoing factors undermine appellants' argument that, pursuant to the principle articulated in section 1642, the arbitration agreement and the offer letter must be seen as "part of substantially one transaction." But these factors are not appellants' biggest problem. By far the major deficiency in appellants' section 1642 claim is that it is now being advanced for the first time.

C.

" 'As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal; appealing parties must adhere to the theory (or theories) on which their cases were tried. This rule is based on fairness—it would be unfair, both to the trial court and to the opposing litigants, to permit a change of theory on appeal . . . .' [Citation.] 'New theories of defense, just like new theories of liability, may not be asserted for the first time on appeal.' [Citation.] ' "Appellate courts are loath to reverse a judgment on the grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. . . . Bait and switch on appeal not only subjects the parties to avoidable expense, but also wreaks havoc on a judicial system too overburdened to retry cases on theories that could have been raised earlier." ' [Citation.]" (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997.)

The three legal arguments appellants made below in support of their motion to compel—which have nothing to do with the idea embodied in section 1642 and never mention that statute—are limited to those clearly identified in the motion to compel. The motion advances three legal claims under the following rubrics: (1) "The [FAA] and Its Policy Favoring Arbitration Govern This Arbitration Agreement"; (2) "The FAA Mandates Enforcement of the Parties' Arbitration Agreement"; and (3) "The Parties' Arbitration Agreement is Not Unconscionable and Should Not be Invalidated as Such."

The motion also argued that the "PAGA claims should be stayed pending the arbitration of remaining claims."

Nowhere in the motion to compel is there any reference to the offer letter or section 1642, nor did appellants mention the offer letter or the statute at the hearing held by the superior court after issuance of the tentative opinion. Unsurprisingly, neither did the trial court.

It deserves to be noted that, in his opposition to the motion to compel, Philbin pointed out that not only did the agreement itself fail to define the "company" but there was not "any additional context from which to deduce what employer entity or entities intended to be bound by the agreement" (as there was, Philbin noted, in *Fittante v. Palm Springs Motors, Inc.* (2000) 105 Cal.App.4th 708), because *"[d]efendants concede the arbitration clause was a 'stand-alone agreement.*' " (Italics added.) Philbin's argument overtly invited appellants to make the section 1642 claim they belatedly advance here. By rejecting the invitation, appellants forfeited the right to raise that claim now.

Philbin emphasized in his respondent's brief on appeal that appellants' section 1642 argument flouted the longstanding general rule that theories not raised in the trial court cannot be asserted for the first time on appeal, but appellants did not in their closing brief even acknowledge, let alone contest, that claim. We, however, cannot ignore it.

DISPOSITION

For the foregoing reasons, the denial of appellants' motion to compel arbitration of Philbin's employment claims is affirmed. Costs on appeal are awarded Philbin.

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Kline, P.J.

We concur:

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Richman, J.

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Miller, J.

Philbin v. Carneros Resort and Spa (A154317)